

ALL MEDIATORS: PLEASE READ CAREFULLY

Mediation template documents: guidance for mediators

Resolution provides a template Agreement to Mediate and template wording for the Open Financial Summary/Statement and Memorandum of Understanding/Privileged Summary of Proposals for use by member and/or affiliate member mediators. An Agreement to Mediate template for Hybrid Mediation is available separately for those who have completed training. However, we are aware that many mediators prefer to draft or to use an Agreement to Mediate or wording for their outcome documents that fits their individual practice.

Generally, any Agreement to Mediate should be regarded as setting out the terms and conditions ('client care' provisions) between mediator and clients and whilst a 'short form' document might be preferred by mediators; it is important that all mediators are aware that there is information that **must** be provided in the Agreement in relation to matters set out in the Family Mediation Council (FMC) Code of Practice and in regard to other over-riding regulations or legislation including those relating to data protection legislation and regulation. (For further information, see the website of the [Information Commissioner's Office \(ICO\)](#)). Similarly, there is template wording for the outcome documents from a mediation that is designed to ensure that the clients and the mediator are protected from misunderstandings or claims against them.

Set out here is a note to assist mediators in relation to what is essential to have set out in any Agreement to Mediate document in order to protect both clients and mediators and to ensure that the Agreement is compliant with the requirements of the FMC and in respect of other legislative obligations that apply.

Agreement to Mediate

If you decide that you prefer to use a 'short form' agreement on the basis of providing information verbally to explain more fully the terms of the Agreement, please be aware that it is often very difficult for prospective clients to absorb a lot of verbal information or explanation and that they may not remember or recall what you have said. As a

mediator you have a duty to ensure that you have established a safe and informed environment in which clients may discuss and resolve issues between them; this includes ensuring that prospective clients are clear about the principles and terms of their mediation process.

Working remotely with mediation clients

(and see para. 35. of the template Agreement)

Resolution also provides an Addendum to the Agreement to Mediate that covers all aspects of working remotely. Mediators should ensure that they have set out in any self-drafted Agreement or Addendum such conditions that apply to remotely conducted or 'blended' arrangements for mediation meetings.

Principles of mediation

(paras. 1. – 5.)

It is essential that the principles of mediation are set out for any prospective clients in the Agreement. Therefore, Agreements should make clear that:

Voluntary participation

- **Mediation is a choice** and that people must be free to come voluntarily and without feeling compelled to attend and importantly, without feeling at risk of any kind.

Decision making and client autonomy

- **It is important that people are aware that the decision-making rests with them** (rather than with the mediator who must remain neutral as to the outcome of a mediation at all time) and that the mediator will provide such information as will assist them in respect of their situation and will discuss when it might be or is important for them to have independent, individual advice.
- **Mediators may inform clients if and when the proposals or decisions they are considering fall outside the parameters which a court might approve or order** (FMC CoP 6.2). However, it is very important that mediators are clear in any Agreement to Mediate (and in the mediation) that this is information to assist

them and that the mediator will also provide information about possible courses of action, including seeking individual legal advice.

Conflict of interest, impartiality and even handedness

(paras. 6. – 8.)

- **The Agreement should make clear the mediator's role to conduct the mediation impartially and in an even-handed way.** It should also set out information about conflict of interest and what will happen should any such conflict arise. Information about Conflict of Interest and the FMC Code of Practice requirements are available in the [Mediation Handbook](#).

Confidentiality, privilege and protection from harm

(paras. 9. – 15.)

- **The fact that mediation is generally a confidential process must also be made clear** – along with the exceptions to confidentiality – notably risk of any harm or abuse to anyone involved in the mediation and particularly in relation to any child or young person. The Agreement should also set out that the mediator has a duty to refer concerns to an appropriate agency (usually Children's Services where there is concern or allegations about harm to a child or young person). This duty is set out in 'Working Together' and all mediators should be aware of the statutory guidance that is set out in the Working Together document and the local arrangements set out by their local safeguarding children board.
- **Participants should also know that mediators cannot keep confidential** any information in relation to committing an offence or breaking the law, in which case the mediator would have a duty to report such information to an appropriate agency. N.B. for mediators trained in the conduct of hybrid mediation, provision in respect of confidentiality arrangements is set out in the template Hybrid Agreement to Mediate.
- **Confidentiality applies to both participants and mediator**, therefore confidentiality of discussions in a mediation cannot be lifted unless mediator *and* participants agree or the Court makes an Order that confidentiality should be

lifted or there is any other over-riding obligation in law in respect of the particular circumstances

- **Without prejudice privilege** however (that applies generally to communications and to the content of the MOU), can be lifted if both participants agree.
- **The Agreement should also make clear** the difference between that part of the mediation which is confidential and privileged and what is 'open'. Information relating to financial disclosure is 'open'.
- **It is also useful to clarify that once a mediation begins**, any correspondence, emails etc., sent to the mediator will be shared and that the mediator will also share any response s/he makes with each and both clients.

Links with other services and Arbitration

(paras. 19. - 21.)

- **Other professionals being involved in mediation is a growing practice.** The FMC Code of Practice sets out at 8.15 and 8.16 the involvement of other professionals if the participants agree and the mediator considers that it would be appropriate. Please ensure that your Agreement to Mediate sets out the potential for involving other professionals.
- **It is important that people understand that their choice is not 'mediation or court'.** Mediation is a flexible process and can easily lend itself to the involvement of other professionals or approaches in order to create with the clients the type of comprehensive service that will ultimately aid them to having a binding agreement together and might have application beyond that point in assisting clients to work out how the decisions they have made will be put into day-to-day use.
- **Generally, mediators should provide information about the prospect of involving other professionals or professional services** and in relation to how confidentiality will apply between the professionals involved (including ensuring that any arrangements are compliant with data protection regulation) and any information in relation to how payment might be arranged.
- **Mediators who are working in this way should ensure that they have worked out appropriate arrangements** for team-working, referral,

commissioning/contracting and confidentiality with colleague professionals. It is also important that participants are provided with accurate information about making a complaint about any of the professionals involved.

- A [template document](#) ('Helping You to Get the Best Solutions') is available that sets out approaches in mediation and the type/nature of other professionals and how they may complement a mediation process
- **The template Agreement includes** a paragraph to be used where mediators and clients have agreed to keep the prospect of Arbitration under review. Information about arbitration should also include that decisions made by an Arbitrator are binding, unlike decisions made in mediation.

Further information about inter and multi-disciplinary working, the involvement of solicitors and of other professionals in a mediation process is available in the [Mediation Handbook](#).

Summaries and recording of Outcome Proposals/Drafting Standard Orders

(paras. 22. – 24.)

The template Agreement also includes a form of words to be used by those mediators who intend or who may offer the drafting of detailed terms or standard orders as part of the package of mediation outcome documents.

We recommend that mediators use this template wording to provide protection for themselves and their clients and to ensure that they do not breach e.g. insurance requirements. Any draft terms or draft standard order **MUST** be clearly marked as part of the Memorandum of Understanding so that its' non-binding status is clear. More information about the drafting of detailed terms/Standard Orders is available in the Mediation Handbook.

Other areas that must be covered include:

Concerns and complaints

(para. 25.)

- **It is a requirement set out in the FMC Standards Framework that any Agreement should be clear in relation to how to make a complaint.**

Agreements should also make clear that in the event of any complaint to an external organisation (Resolution, the Legal Ombudsman, SRA or other regulator or governing body) that participants (by signing the Agreement to Mediate) agree that their file and any relevant papers may be released to the relevant organisation/s for the purposes of dealing with the complaint. You should also consider having a separate consent form in relation to data protection that is also signed by individuals in order that participants are clear about your arrangements in relation to the professional management of personal data and agree to any specific terms (i.e. release of their information for the purposes of resolving a complaint etc.).
- **Generally, it is also good practice that an Agreement should make clear what participants should do if they have a concern or complaint,** the arrangements in relation to any complaints procedure within the firm or practice (please ensure that you have properly briefed and explained to any compliance or complaints partner or officer how a mediation complaint should be dealt with). Agreements should also make clear that there is an external route for complaints once any internal process has been exhausted without the matter being settled. The Agreement should set out how to access any complaints policy or procedure (which is also a requirement set out in the FMC Standards Framework).

Mediators should also be aware that participants may also be able to have a complaint investigated by The Legal Ombudsman (in relation to poor service). If you are a **mediator who is a solicitor mediating from your legal practice and using your firm's insurance cover**, the SRA may also accept a complaint if there is a claim that you have breached SRA principles. The FMC is seeking clarification in regard to mediation complaints from both the SRA and the Legal Ombudsman. Resolution will notify mediator members of any change in arrangements as soon as it is available.
- **Mediators should also take care to clarify for clients the mediation organisation complaints route to be taken up** if it should reach a stage where the mediator's membership organisation is to be involved. Generally, if a mediator has conducted the mediation under Resolution guidelines, the stated complaints route should be to Resolution (and/or the Legal Ombudsman and/or the SRA (if mediating from a regulated practice). If, however, the mediator has stated in the Agreement to Mediate that they are a member of another mediation organisation or has conducted the mediation under the rules and or

requirements of another organisation of which they are a member, then it should be made clear that is the route for external complaints. (Please also be aware that organisations may have other and different arrangements and requirements in relation to complaints procedures). Mediators should take care not to confuse clients about appropriate complaints routes or to leave themselves open to multiple or cumulative complaints across their member organisations. Further information about this aspect of practice is available in the Resolution Guide to Good Practice on Mediation and in the Mediation FAQ section on the Resolution website.

Data protection

(para. 26.)

- **Mediators have a duty to act within the requirements of Data Protection legislation and regulation.** Generally and in short form, this means that there is a duty to handle, manage and destroy information confidentially, securely and professionally and not to share any information about the participants without their expressed permission to do so.
- **You should consider having a separate Privacy Note or Policy** which sets out clearly how you collect, manage, store and destroy information securely that is easily and readily available to individuals and you should ensure that individuals have given their consent to your arrangements in relation to their information, including the release of information or their file to Resolution or to any other external regulator for the purposes of resolving a complaint.
- **Individuals have the right to see any personal data or information held about them;** that means that the participants to the mediation have a right to see their file should they wish and on request. Mediators may not provide information from the file that refers to both to one person without the agreement of the other unless the mediator considers on examination of the information that it is appropriate to do so. Please note that Part 4, Sch. 7 of the data protection legislation allows for exemption to disclosure in relation to negotiations where it would be likely to prejudice the negotiations. However, you should consider carefully whether this exemption is justified in any decision to withhold information. (Further information is available from the [ICO website](#)).

- **From time to time mediators may receive a ‘subject access request’** under data protection legislation, this is a request from an individual to have sight of any and all information held by the mediator about them individually. There is further information about these requests and how best to deal with them in the [Mediation Handbook](#) (Conduct of Mediation section).
- **Mediators should also make clear that their PPC or Supervisor** has sight of mediation files and if the mediation practice is conducting Legally Aided mediation, that the LAA may also have access to files. If you intend to retain or store information for statistical or research purposes, you should also ensure that it is appropriately anonymised and ensure that the individuals cannot be identified from any record you keep. Full information about data protection responsibilities can be accessed at the website of [Information Commissioner's Office \(ICO\)](#).

Learning and professional development

(para. 27.)

- **Many mediators will be assisting newly qualified mediators into practice** by allowing observation of practice or co-mediating with a newly trained colleague and there is also a requirement for PPCs/FMCA mediators to observe mediation practice set out in the FMC Standards Framework. If it is the case that new mediators, PPCs or an FMCA mediator might observe or co-mediate as part of learning and professional development, then the Agreement should make clear this is the case and also make it clear that clients can decline the involvement of another mediator or PPC in their mediation.

Fees and charges

(paras. 30. – 34.)

- **The Agreement should set out clearly applicable fees and charges and ways to pay.** If mediators apply cancellation fees, this should also be set out in the Agreement.

PLEASE NOTE: Agreements to Mediate **MUST** be signed by clients and mediator before commencing mediation. To not do so is a breach of the FMC Code of Practice and threatens the special protection afforded to both clients and mediator.

Further information in relation to principles and FMC Code of Practice can be found in the Resolution [Mediation Handbook](#). Information in respect of the FMC Standards Framework can be found both in the Mediation Handbook and on the [FMC website](#).